A

PP

v.

CHETTUVELU NANI

B

HIGH COURT MALAYA, SHAH ALAM
NALLINI PATHMANATHAN JC
[CRIMINAL APPEAL NO: 42A-10-2004]
15 AUGUST 2007

C ***PUBLIC SERVANTS:*** *Criminal offence - Bribery and corruption - Police officer allegedly soliciting a bribe to procure release of two suspected drug addicts - Presumption that money was corruptly accepted under s. 42(1) of Anti Corruption Act 1997 - Whether there was insufficient evidentiary basis to invoke statutory presumption - Whether relevant*
D *ingredients of the charge under s. 10(a)(aa) of Anti Corruption Act 1997 established - Whether there was basis for interfering with decision of trial judge*

This was an appeal by the public prosecutor ('the appellant')
E against the decision of the sessions court judge ('the trial judge') acquitting and discharging the respondent. Three charges were preferred against the respondent, a policeman at the material time, under the Anti Corruption Act 1997 (the Act). The instant appeal was related to the first charge against the respondent for allegedly
F to have corruptly solicited a bribe from two persons, namely Jambushekan a/l Sivam (Jambu) and Sivanesan a/l Sanmugalingam Sivanesan (Sivanesan) to facilitate the release of two suspected drug addicts who were remanded by using the respondent's position/office and powers to do so. The trial judge concluded that
G there was no *prima facie* case against the respondent upon evaluating the contradictions as to the date when the bribe was solicited and the basis the bribe was solicited by the respondent. The appellant submitted *inter alia*, that the date cited in the charge of the two suspected drug addicts was not an essential
H ingredient that had to be proven and consideration ought to be given to the entirety of the evidence of Jambu and Sivanesan, that sufficient consideration were not given to the fact that the respondent had no reason to solicit money from Jambu and Sivanesan other than to facilitate the release of the two suspected
I drug addicts. The appellant argued that it was sufficient that a bribe had in fact been solicited and the fact itself was sufficient to warrant a conviction triggering presumption under s. 42 of the Act rendering the solicitation corrupt. The respondent, however,

disagreed and argued that the date in the charge constituted an essential ingredient of the offence under s. 10(a)(aa) of the Act and that due consideration to the evidence in totality was done before the learned judge concluded that there was no *prima facie* case against the respondent. Hence, the appeal.

Held (dismissing the appeal):

(1) The actual evidence in the instant case appeared to be sufficient to show that there was a meeting between the respondent and two suspected drug addicts at the police station on 26 January 1998. It was on that date and the specified location that the respondent allegedly sought a bribe to procure the release of two suspected drug addicts. The learned judge appeared to have erred in concluding that by reason of Jambu's inability to recollect the date with certainty that there was a material contradiction between the evidence of Jambu and Sivanesan on this point, resulting in an essential ingredient not having been proved. (para 28)

(2) There was a lacuna in the chain of evidence adduced, in that it was not evident what official act the respondent did or did not do, to procure the release of the youths, wherein the inducement for such act or omission being the sum of RM2,000 (the sum of monies). A connection must be established between the performance to do and forbear from doing an official duty and the demand of the gratification before it could be proven that the sum of monies was solicited in order to procure the release of the youths. The prosecution had failed to establish the ingredients of the charge under s. 10(a)(aa) of the Act. (paras 40 & 42)

(3) The statutory presumption had not been invoked as the relevant ingredients in the charge under s. 10(a)(aa) of the Act had not been established. It would be erroneous to apply the statutory presumption under s. 42 of the Act based on proof of the asking or soliciting of gratification and then relying on the statutory presumption to establish the facts relating to the inducement. There was insufficient evidentiary basis to invoke the statutory presumption. (para 45)

(4) It would be erroneous to take a clinical approach and surgically incise the totality of the evidence such that only certain portions were considered in isolation and that the instant court should be slow to interfere with the findings of the court below. There was no basis for interfering with the decision of the learned trial judge who had considered serious doubts as to whether a *prima facie* case had been established in the face of material contradictions on the evidence adduced. (para 48)

[Appeal dismissed]

Case(s) referred to:
Dato' Seri Anwar Ibrahim v. PP and Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Ho Ming Siang v. PP [1996] 1 MLJ 252 ***(refd)***
Lim Kheak Teong v. PP [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 FC ***(refd)***
Pie Chin v. PP [1983] 1 LNS 70 ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1977] 1 MLJ 15 ***(refd)***
PP v. Romanus Clement Ungkin & Anor [2005] 7 MLJ 447 ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, s. 10(a)(aa)
Criminal Procedure Code, s. 153
Prevention of Drugs Act, s. 4(1)(b)

For the prosecution - Puan Azlina DPP
For the respondent - En Athimulen; M/s Athimulen & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Nallini Pathmanathan JC:

Introduction

[1] This is an appeal by the public prosecutor ('the appellant') against the decision of the learned sessions court judge ('the trial judge') dated 24 February 2003, acquitting and discharging the respondent ('the accused') without calling for defence, at the close of the prosecution case, in respect of one of three charges brought against him.

[2] In the court below, three charges were preferred against the respondent under the Anti-Corruption Act 1997 ('the Act'). He was, at the material time, a policeman bearing the rank of Detective Sergeant and stationed at Balai Polis Damansara Utama. This appeal relates to the first charge.

[3] The appellant lodged no appeal against the decision of the trial judge acquitting and discharging the respondent in respect of the second charge. The respondent was convicted in respect of the third charge brought against him. That decision however is the subject-matter of Appeal No.: 42A-18-2004, which is not dealt with here.

Relevant Charge For This Appeal

[4] The first charge, which is the only charge that is material for the purposes of this appeal, when translated reads as follows:

> That you, on 26-1-98 at about 11.00 a.m. at the Balai Polis Damansara Utama in the District of Petaling in the State of Selangor did corruptly solicit a bribe namely RM2000.00 each from one Jambukeshan a/l Sivam and Sivanesan a/l Sanmugalingam as inducement to you, Detective Sergeant 72789 working in the Narcotics Division, Balai Polis Damansara to procure the release of 2 suspects named Manivannan a/l Krishnan and Arivalagan a/l Kuppen @ Kuppusamy who are suspected drug addicts, from remand/detention and by so doing you have committed an offence under s. 10(a)(aa) of the Anti-Corruption Act 1997 that is punishable under s. 16 of the same Act (Laws of Malaysia Act 575).

[5] In essence, the respondent was alleged to have corruptly solicited a bribe from two persons to facilitate the release of two suspected drug addicts who were being held in remand, by using his position/office and powers to do so.

Salient Facts

[6] From the evidence led in the court below, the following salient facts emerge:

6.11 At 12.30am on 24 January 1998, eight (8) males were arrested at Jalan SM10, Taman Sri Manja on suspicion of being involved in the trafficking of drugs. Amongst these eight youths were Manivannan a/l Krishnan ('Manivannan'), Arivalagan Arivalagan ('Arivalagan') and Batumalai a/l

Ramasamy SP9 ('Batumalai'). On arrest they were collectively taken to the Damansara Utama police station ('the police station') and handed into the custody of one Sergeant Jalil bin Abdul Majid SP4 ('Sergeant Jalil'), the Assisting Investigation Officer in this case.

6.12 On the morning of 24 January 1998 the eight youths were produced before a magistrate. One suspect was remanded for the possession of drugs while 7 others were remanded under s. 4(1)(b) of the Prevention of Drugs Act for a period of 14 days pending the results of several drug tests. The respondent was instructed by his superior officer, one Inspector Mohd. Fadzir bin Othman SP2, to conduct the interrogation/investigation in respect of this case involving the eight youths as the suspects were of Indian origin.

6.13 Jambushekan a/l Sivam ('Jambu') was one of the persons who alleged that the respondent solicited a bribe from him. In his evidence he explained that in late January 1998 he heard from his friends that his cousin, Manivannan a/l Krishnan Manivannan, had been remanded at the police station. He and his friend Sivanesan a/l Sanmugalingam Sivanesan, ('Sivanesan') who also had a friend, Arivalagan who had been remanded at the same time, went to the police station to ascertain whether Manivannan and Arivalagan were in reality being held there. At the station, Jambu and Sivanesan were unable to meet the investigating officer, Segeant Jalil, but met the respondent instead. They asked the respondent to help them and were told that Manivannan had been remanded in connection with a drug related offence. Jambu's evidence is that he discussed the matter with the respondent in the respondent's office on the upper floor of the police station. Sivanesan was present throughout their conversation. According to Jambu, the respondent told him that he, the respondent could help Jambu if Jambu co-operated. He went to inform Jambu that if Manivannan's urine tests were positive he could take the requisite steps to ensure that the test results were negative. Jambu would have to pay the sum of RM2,000 (Ringgit Malaysia: Two Thousand only). Jambu states that he asked for time to come up with the sum, but agreed in principle with the proposal.

6.14 Sivanesan was a relevant witness at trial in respect of the first charge because he accompanied Jambu to the police station and was present when Jambu and the respondent had their 'incriminating' conversation. His friend was one of the youths arrested and remanded on 24 January 1998. Sivanesan's evidence in examination-in-chief was that on the morning of 26 January 1998 at about 10.20am he and Jambu went to the police station to meet with the investigating officer in charge of the case, ie, Sergeant Jalil. As he was not there, they waited and were approached by the respondent who asked if they needed any assistance. He testified that they sought the respondent's help. The respondent said that he could help them but they had to pay a sum of RM2,000 (Ringgit Malaysia: Two Thousand only) for each person. This sum of money, the respondent said, was not for him but for the officers who would help Jambu and Sivanesan. In cross-examination however, Sivanesan testified that the conversation pertaining to money was largely between Jambu and the respondent. When the issue of money was discussed Sivanesan says he asked "how much" and Jambu replied "RM2,000" (Ringgit Malaysia: Two thousand only). The entire conversation was conducted in Tamil, a language Sivanesan was not wholly familiar with. He went on to say that he did not fully comprehend the conversation between Jambu and the respondent. His actual words were that he did not "get the whole picture" *vis a vis* the conversation between Jambu and the respondent. Sivanesan went on to state that his friend, Arivalagan was eventually released on bail sometime in February. No payment whatsoever was made to procure his release.

6.15 Both Manivannan and Arivalagan were released on 2 February 1998 and 3 February 1998 on police bail. In this context, the evidence of Inspector Mohd. Fadzir bin Othman, SP2 ('SP2') on the regular procedure adopted in cases of this nature is relevant. SP2 stated that urine samples are obtained from the arrested persons to carry out the relevant tests. The suspects are then produced in a magistrate's court and an order of remand procured for a period of 14 days to wait for the outcome of the tests undertaken. The suspects are then released if produced before the magistrate again and released on police bail. A police officer bearing the rank of

A sergeant and above has the power to grant police bail and seek the release of such suspects. As such it is apparent that the procedure followed in the instant case with regard to Manivannan and Arivalagan was wholly regular.

B 6.16 Manivannan's evidence is relevant to the extent that he is the one who lodged a report with the Anti-Corruption Agency, which triggered an investigation against the respondent and resulted in three different charges being preferred against him. Manivannan's version of his arrest and C detention however is inconsistent with what really happened as borne out by the other witnesses. Manivannan also alleges in this report that the respondent asked him for RM2,000 (Ringgit Malaysia: Two Thousand only) but again the documented version differs significantly from his evidence in D court.

[7] These then are the material facts in relation to the first charge.

Findings Of The Trial Judge

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[8] In her grounds of judgment the trial judge set out the ingredients that had to be proved by the appellant:

> ... Bagi Pertuduhan Pertama dan Pertuduhan Kedua ... intipati-intipati yang perlu di buktikan adalah:
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> F
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> i) OKT secara rasuah meminta suapan
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> ii) Suapan adalah sebagai dorongan untuk atau upah untuk melakukan atau tidak melakukan apa-apa perkara atau transaksi.
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> G
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> Bagi pertuduhan pertama, OKT dikatakan secara rasuah meminta suatu suapan dari Jambu dan Sivanesan sebagai dorongan untuk bantu melepaskan Manivannan dan Arivalagan yang disyaki penagih dadah dari tahanan.

H **[9]** The learned trial judge then undertook a critical evaluation of the evidence of Jambu, Sivanesan, Manivannan and the circumstances in which Manivannan was released. She went on to conclude that there were contradictions as to the date when the bribe was solicited, and the grounds or basis for which a bribe I was solicited in the testimonies of Manivannan, Jambu and Sivanesan. This is what she said:

... Berdasarkan dari apa yang dinyatakan terdapat percanggahan mengenai tarikh suapan diminta. Keduanya alasan suapan diminta juga berbeza diantara keterangan Manivannan, Jambu dan Sivanesan.

Apakah alasannya untuk bebaskan Manivannan dan Arivalagan? Adakah bebas dengan jaminan polis untuk tukar keputusan ujian air kencing atau untuk beri suapan kepada pegawai-pegawai OKT yang akan bantu Jambu dan Sivanesan? Terdapat percanggahan dari segi alasan pembebasan Manivannan dan Arivalagan.

Oleh itu di dapati intipati-intipati bagi pertuduhan pertama gagal dibuktikan oleh pihak pendakwaan.

Oleh itu pihak pendakwaan gagal untuk buktikan satu kes *prima facie* terhadap OKT bagi pertuduhan pertama.

Appellant's Grounds Of Appeal

[10] Although several grounds of appeal were set out in the petition of appeal, the learned deputy public prosecutor confined her submissions at the hearing of this appeal and in her subsequent written submissions to a few grounds. In summary it was contended that the trial judge had erred in placing too great an emphasis on the date when the bribe was alleged to have been solicited, without giving sufficient consideration to the entirety of the evidence of Jambu and Sivanesan. In essence the learned deputy public prosecutor submitted that the date cited in the charge, ie, 26 January 1998, was not an essential ingredient that had to be proven. In so submitting, she relied on the Federal Court case of *Ho Ming Siang v. Public Prosecutor* [1966] 1 MLJ 252.

[11] The second contention was that the trial judge failed to give sufficient consideration to the fact that the respondent had no reason for soliciting money from Jambu and Sivanesan other than to facilitate the release of Manivannan and Arivalagan. In support of this ground the learned deputy public prosecutor argued that it did not matter what the basis or reason for the solicitation of a bribe was; it was sufficient that a bribe had, in fact, been solicited. The fact of solicitation in itself was sufficient to warrant a conviction. Once the fact of solicitation had been proven, then the presumption in s. 42 of the Act was triggered so as to render the solicitation 'corrupt'. In support of this contention, she relied on *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* [1977] 1 MLJ 15. The third ground of appeal was that the trial judge had

wrongly taken into consideration the evidence in exh. P10 and the evidence of Manivannan in relation to the purpose for which the respondent sought a bribe from Jambu and Sivanesan.

[12] Finally it was contended that the trial judge had erred in taking into consideration the fact that no payment was made in respect of the release of the eight (8) males, when the charge preferred against the respondent was in respect of 'soliciting' a bribe.

Respondent's Reply

[13] In reply learned counsel for the respondent maintained that the date of the commission of the offence, ie, the date when the bribe was solicited was an integral or essential ingredient of the charge that the prosecution was bound to prove. He cited the Federal Court decision in *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor and Another Appeal* [2004] 3 MLJ 405 in support of this contention.

[14] The respondent also maintained that the basis for the alleged solicitation of a bribe was an essential fact which had to be proven. It was further contended that it was insufficient to merely show solicitation and then rely on s. 42 to conclude that the offence in the first charge was proven. As for Manivannan's evidence and his report in exh. P10, learned counsel stated that while not directly relevant, it threw doubt on the veracity of SP7 and SP8's evidence as to whether or not the events of 26 January 1998 actually occurred as stated by these witnesses.

[15] In further response, the respondent maintained that the learned judge had made specific findings as to each element of the charge, and had given due consideration to the evidence in totality before concluding that the prosecution had failed to prove a *prima facie* case and accordingly such findings of fact ought not to be lightly disturbed by an appellate court.

Issues For Determination On Appeal

[16] The issues that arise for consideration in this appeal are:

(a) Whether the date in the charge comprising the subject matter of this appeal is an essential ingredient of an offence under s. 10(a)(aa) of the Act and if so, whether it has been proven by the prosecution;

(b) Whether the basis for inducing the respondent to do or forbear from doing an official act, ie, the basis as stated by Jambu and Sivanesan for the solicitation of a bribe by the respondent is an essential ingredient of an offence under s. 10(a)(aa) of the Act and if so, whether it was proven on the facts of this case;

(c) Whether it was sufficient for the appellant to establish 'solicitation' whereupon the presumption in s. 42 of the Act would be triggered such that the solicitation would be deemed to be corrupt;

(d) Whether the learned trial judge erred in taking into consideration SP5's evidence when concluding that a *prima facie* case had not been made out at the close of the prosecution case.

Issue (a): Whether The Date In The Charge Comprising The Subject Matter Of This Appeal Is An Essential Ingredient Of An Offence Under s. 10(a)(aa) Of The Act And If So, Whether It Has Been Proven By The Prosecution

[17] The date of commission of the offence is stipulated in the charge as 26 January 1998. In examination in chief, Jambu did not give any evidence as to the date when he went to the police station to enquire about his cousin, Manivannan. In cross-examination, Jambu stated that he went one day after Manivannan had been arrested which he recalled to be 25 January 1998. It is evident from a reading of his evidence on this issue that he was unclear about the actual date when he met up with the respondent at the police station, save that it was soon after Manivannan was arrested. Sivanesan stated in his evidence that he went to the police station with SP7 on 26 January 1998, and met up with the respondent there. He recalled it was a Monday.

The learned trial judge commented on the evidence of these two witnesses in relation to the date as follows:

> ... Semasa pemeriksaan utama, SP7 tidak ingat tarikh SP7 dan SP8 berjumpa OKT dimana OKT meminta suapan. Semasa disoal balas, SP7 kata dia berjumpa OKT pada 25-11-1998. Apabila disoal lanjut, SP7 kata, dia tidak ingat tarikh. Didalam pertuduhan pertama tarikh suapan dikatakan diminta adalah 26.1.1998 ...
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> ... Menurut SP8 pula, pada 26.1.1998, SP8 dan SP7 ada berjumpa OKT di Balai Polis Damansara ...

A Berdasarkan dari apa yang dinyatakan terdapat percanggahan mengenai tarikh suapan di minta.

[18] The trial judge found that there was a discrepancy between the evidence of Jambu and Sivanesan in relation to the date of solicitation of the bribe. Accordingly she concluded in conjunction with other evidence that the ingredients of the first charge had not been proved. Is the date then an essential ingredient of an offence under s. 10(a)(aa) of the Act?

The said section provides as follows:

Any person who by **himself**, or by or in conjunction **with any other person:**

(a) **corruptly solicits** or receives or agrees to receive for himself or for any other person; or

(b) ...

any gratification as **an inducement** to or a reward for, or otherwise on account of:

(aa) **any person doing or forbearing to do anything** in respect of any matter or transaction, actual or proposed or likely to take place; or ...

(bb) ...

shall be guilty of an offence (emphasis added).

[19] The ingredients required to be proved in relation to this section are:

(i) Any person, who by himself or with any other person;

(ii) Corruptly solicits;

(iii) Any gratification;

(iv) As inducement to any person doing or forbearing to do anything in respect of any matter

[20] In relation to the charge which is the subject matter of this appeal, therefore the matters that would have to be proved would be as follows:

(i) The respondent, either by himself or with any other person;

(ii) Corruptly solicited from Jambu and Sivanesan on 26 January 1998 at the police station;

(iii) Monies or the sum of RM2,000 (Ringgit Malaysia: Two Thousand only) each from them;

(iv) As inducement to the respondent to carry out or forbear from carrying out some official act so as to procure the release of Manivannan and Arivalagan from remand/detention.

[21] The date of the alleged offence therefore comprises a part of the ingredient of 'corruptly solicits' in s. 10(a)(aa) of the Act. Moreover, s. 153 of the Criminal Procedure Code ('CPC') provides that the date of an offence is a material part of a charge. It reads as follows:

> The charge shall contain, such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.

[22] The learned deputy public prosecutor however relied on the Federal Court decision in *Ho Ming Siang v. Public Prosecutor* [1996] 1 MLJ 252 to maintain that the date specified in the charge was not material unless it is actually an essential part of the offence. In that case, Thomson LP stated as follows:

> With regard to the first of these charges, the dates are wrong and the charge was at no time amended, but as was pointed out in *Law Kiat Lang v. Public Prosecutor* this is without importance. As was said by Atkin J in the case of *Severo Dossi*:
>
> > From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.

[23] It was therefore maintained that the date of the solicitation of the bribe in relation to Jambu's evidence, namely his uncertainty as to the date was not a material or essential ingredient that had to be proved and that the trial judge had erred in taking this into consideration when arriving at her findings.

[24] In *Dato' Seri Anwar bin Ibrahim v. Public Prosecutor and Another Appeal* [2004] 3 CLJ 737 the Federal Court had occasion to consider and review this line of authorities in relation to the date of commission of an offence. I can do no better than to reproduce the judgment of the apex court in that matter:

> ... However we think we have to say something on the oft-quoted sentence from the judgment of Atkin J in *R v. Severo Dossi* [1918] 13 Cr App R 158:
>
> > From time immemorial a date specified in an indictment has never been a material matter unless it is an essential part of the alleged offence.
>
> The learned trial judge in this case quoted in support of his statement "In any event a date in the charge has never been material" when he was discussing whether the charges are vague and weak, nor whether it is material that it must be proved. He merely quoted the sentence as quoted in *Law Kiat Lang v. Public Prosecutor* [1996] 1 MLJ 215 (FC) and *Ho Ming Siang v. Public Prosecutor* [1996] 1 MLJ 252.

To understand the context in which that statement was made, we should look at the facts of that case.

> In that case, a 1918 judgment of the Court of Criminal Appeal in England, the appellant (accused) was charged with indecently assaulting a child 'on March 19th, 1918' and with indecently assaulting another child 'between September 12th and 30th, 1917.' The jury found the appellant not guilty with regard to the March 19th charge but 'If the indictment covers other dates, Guilty'. They also found him not guilty of indecently assaulting the second child. On the application of the prosecution the Deputy Chairman amended the indictment by substituting 'on some day in March'for the words 'on March 19th 1918', and the jury then found the appellant guilty on the amended charge.
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> The judgment of Atkin J. *inter alia*, reads:
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> > the first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him Not guilty and that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. 'And although the day be alleged, yet if the jury

finds him guilty on another day the verdict, is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the same law is in the case of an indictment' 2 Inst 318

It is to be noted that in that case the court was concerned with the power of the court to amend the charge from 19 March 1918 to on some day in March of the same year as the jury had found that the charge bearing the specific date 19th March had not been proved but it was proved that the offence was committed in the month of March. That is the context in which that statement was made. Even than, the sweeping opening words were qualified by the words 'unless it is actually an essential part of the alleged offence.'

That passage was quoted by the Federal Court in *Law Kiat Liang v. Public Prosecutor*. That case is one of the 'Konfrontasi' cases. In the first charge the date of the alleged offence was given as 'between 2 am on 2nd day of September, 1964 and 12 noon on the 4th day of September 1964.'

In the judgment of the court, Thomson LP, after reproducing the charges, straight away went on to say: 'With regard to the first of these charges, the dates are wrong and the charge was at no time amended. This in itself however, is without importance. As was observed by Atkin J in the case *Severo Dossi* …

The learned Lord President went on to cite the same sentence reproduced earlier. Nothing more was said on it. No reference was made to s. 153(1) of the Criminal Procedure Code, our written law. However considering his statement that 'the dates are wrong' it appears to us that in that case, as in *Severo Dossi* followed by the court, it was proved that the offence was committed on another day (or period) but not the date (or period) specified in the charge. That being the case, it is understandable why having referred to that case he said no more about the appeal before him on that point. The only difference is that in the Federal Court case, the charge was not amended.

The case of *Ho Ming Siang v. Public Prosecutor* is similar to *Law Kiat Lang v. Public Prosecutor.* Even the date of the alleged offence in the first charge is the same. That part of the judgment is a repetition of what was said in *Law Kiat Lang v. Public Prosecutor.*

It must be noted that in all these cases the court did find that the offences were proved to have been committed on another date, even though not on the date stated in the charges. In the circumstances, the convictions were upheld.

> In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date. As has been pointed out, the Federal Court in the two cases referred to earlier did not address its mind to the provision of s. 153(1) of the Criminal Procedure Code. Perhaps that was because it was only dealing with the question whether the charges should have been amended. *In the instant appeals we are dealing with the question whether, the offences not having been proved to have been committed on another date, it must be proved to have been committed on the date stated in the charges. Section 153(1) of the Criminal Procedure Code clearly states that 'The charge shall contain such particulars as to time …'. Since it is mandatory to state the 'time' (ie, the date or period) when an offence is alleged to have been committed, clearly it is a 'material matter' and an 'essential part of the alleged offence' to use the words of Atkin J in the exception stated by him, even if that case is applied. If the law clearly provides that the charge shall contain particulars as to 'time' it follows that such particulars must be proved.*
>
> … *So there is really no issue whether the date of the alleged offences as stated in the charges have to be proved. The issue is whether it is proved* … (emphasis added).

[25] Likewise in the instant appeal the issue is not the amendment of the date of an offence, the commission of which has been proved to have occurred on some other date. The issue is whether, the offence not having been proved to have been committed on another date, it must be proved that it occurred on the date specified in the charge. The appellant in the instant case had not shown that the offence of solicitation had been proved on some other date, but was in fact seeking to prove that the respondent solicited a bribe from Jambu and Sivanesan on 26 January 1998. The trial judge relied on what she felt was an inconsistency in the evidence of both these witnesses to conclude that the actual date of commission of the offence had not been established. On the basis of the decision of the Federal Court in *Dato' Seri Anwar Ibrahim v. Public Prosecutor and Another Appeal* (as above) as well as s. 153 CPC, it follows that the date of the commission of the offence is an essential ingredient that has to be proved in s. 10(a)(aa) of the Act.

[26] However the matter does not end there. Having concluded that proof of the date, ie, the time of the commission of the offence is essential, it is necessary to consider on the entirety of the evidence of Jambu and Sivanesan whether the date of commission of the offence was in fact proved on the evidence adduced, or whether as concluded by the learned trial judge, there was a material contradiction such that the date 26 January 1998 was not proved. A perusal of Jambu and Sivanesan's evidence shows that while Sivanesan had no difficulty in recalling the date of the incident, Jambu could not recollect the date with certainty. He was however sure that it was a day after Manivannan had been arrested and remanded. During cross-examination when it was suggested to him that Manivannan was arrested on 24 January 1998 or 25 January 1998, he thought the relevant date might have been 25 January 1998. He was not far wrong in that there was a difference of only one day. Does this discrepancy warrant a conclusion that there was a contradiction which was so material as to justify a finding that there was no certainty as to when the date of the act is alleged to have taken place? Given that Jambu agreed that he could not recollect the date with certainty and given that the difference between his testimony and that of Sivanesan was merely a day, it would appear that there was no significant or material contradiction between the evidence of Jambu and Sivanesan in relation to the date.

[27] As stated in *Pie bin Chin v. Public Prosecutor* [1983] 1 LNS 70:

> ... Forgetfulness and failure to recall exactly certain events, which did not seem to be important to the witness, do not necessarily shake his credibility or render other parts of his story unworthy of belief. Various persons are endowed with varying powers of cognition, attentiveness and perception, so that it is not uncommon for two witnesses to a common event to describe it in slightly differing versions ...

[28] In conclusion on this ground, it would appear that although it cannot be said that the date specified in the charge is not an important element in establishing the commission of the offence, the actual evidence in the instant case appears to be sufficient to show that there was a meeting between the respondent and Jambu and Sivanesan at the police station on 26 January 1998. And it is on this date and at the specified location that the

respondent allegedly sought a bribe to procure the release of Manivannan and Arivalagan. To that extent the learned trial judge appears to have erred in concluding that by reason of Jambu's inability to recollect the date with certainty there was a material contradiction between the evidence of Jambu and Sivanesan on this point, resulting in an essential ingredient not having been proved. As a consequence this ground of appeal succeeds.

Issue (b): Whether The Basis For Inducing The Respondent To Do Or Forbear From Doing An Official Act, ie, The Basis As Stated By Jambu And Sivanesan For The Solicitation Of A Bribe By The Respondent Is An Essential Ingredient Of An Offence Under s. 10(a)(aa) Of The Act And If So, Whether It Was Proven On The Facts Of This Case

[29] This portion of the charge states that the accused solicited gratification of RM2,000 (Ringgit Malaysia: Two Thousand only) each from Jambu and Sivanesan to procure the release of Manivannan and Arivalagan. One of the essential ingredients that needs to be proved (as above) is that the sum of RM2,000 (Ringgit Malaysia: Two Thousand only) each was sought to procure the respondent to carry out or forbear from carrying out an official duty in his capacity as Detective Sergeant.

[30] In *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No. 2)* above, Raja Azlan Shah FJ (as His Majesty then was) stated as follows:

> ... The word "inducement" evidently refers to a future act. What is forbidden, generally speaking, is soliciting a gratification as an inducement to do any matter or transaction in which the State Government is concerned. The gravamen of the offence is soliciting a gratification as an inducement to do any official act or conduct. This need not be proved by explicit evidence but may be inferred from surrounding circumstances ...

[31] It is therefore clear that the act which the respondent undertook to carry out or forbear from carrying out in the course of his official duties so as to procure the release of these persons held in remand has to be proven. What then was the precise act which the respondent carried out or forebore from carrying out so as to procure the release of Manivannan and Arivalagan? And was it proved in this case?

[32] A reading of the totality of the evidence fails to reveal precisely what it is that the respondent did, or did not do, in the course of his official duties to procure the release of Manivannan and Arivalagan, and in respect of which he sought the inducement of RM2,000 (Ringgit Malaysia: Two Thousand only) each. This is because all eight youths, including Manivannan and Arivalagan were released in accordance with regular or normal procedure after nine or ten days in detention, by way of an order of a magistrate. That this is regular procedure is clear in the evidence of the second witness, Inspector Mohd. Fadzir bin Othman. There is therefore a lacuna in the chain of evidence adduced, in that it is not evident what official act the respondent did or did not do, to procure the release of the two youths, the inducement for such act or omission being the sum of RM2,000 (Ringgit Malaysia: Two Thousand only) each.

[33] The learned trial judge made a finding in relation to this issue that Jambu and Sivanesan's evidence, not to mention Manivannan's, contained material contradictions, thereby throwing doubt as to which of these versions was correct, resulting in the conclusion that the last limb of the charge was not proved.

[34] Jambu's evidence in relation to this issue is that the respondent told him that he could help Jambu if Jambu co-operated. He went on to inform Jambu that if Manivannan's urine tests were positive he could take the requisite steps to ensure that the test results were negative. Jambu would have to pay the sum of RM2,000 (Ringgit Malaysia: Two Thousand only). From Jambu's evidence it is apparent that the inducement for the bribe was that the respondent could and would change the urine tests, if they were positive, to negative. The net consequence would be that no drug related charge could then be preferred. However there is nothing on the evidence to show that any such change was in fact effected. No evidence was led as to the outcome of the urine tests, nor were the urine tests or their outcome linked to Manivannan's or any other of the youths release in early February.

[35] Sivanesan's evidence, it will be recalled, was that he was present throughout the conversation between Jambu and the respondent. His recollection of events however, was that the respondent approached them and asked if he could be of assistance. In examination in chief, Sivanesan said that the

respondent stated he could help but that they had to pay RM2,000 (Ringgit Malaysia: Two Thousand only) for each person. The respondent went on to state that the money was not for him but for the officers who would help Jambu and Sivanesan. In cross-examination though, Sivanesan admitted that he was not conversant in the Tamil language and that as the entire conversation between Jambu and the respondent had been conducted in Tamil, he did not fully comprehend everything that was said. To use his words:

> Ya, saya setuju saya tidak dapat whole picture perbualan di antara Jambu dan OKT …

[36] He understood that the sum of RM2,000 (Ringgit Malaysia: Two Thousand only) was sought to secure the release of SP5 and SP6. Again it was unclear from his evidence what precisely the respondent had agreed or promised to do or not to do to procure the release of Manivannan and Arivalagan.

[37] The youths including Manivannan and Arivalagan were released on 9 and 10 February 1998 pursuant to an order by a magistrate, in accordance with routine procedures adopted by the police in such cases. In short, there was nothing to connect the soliciting of the RM2,000 (Ringgit Malaysia: Two Thousand only) each with the release of these youths because it was not apparent from the record of evidence, what official act the respondent is supposed to have carried out so as to "procure their release".

[38] The appellant contended that the nature of the inducement, ie, the act that the respondent was supposed to do or forbear from doing in return for the gratification of RM2,000 (Ringgit Malaysia: Two Thousand only) was irrelevant. The fact that the RM2,000 (Ringgit Malaysia: Two Thousand only) was solicited was sufficient to warrant a conviction under s. 10(a)(aa) of the Act. As discussed above the purpose for which the gratification is tendered, ie, the act which the accused person has to do or forbear from doing is an essential ingredient that has to be proved. In the instant case the evidence of material witnesses was contradictory in that it was not patently clear whether the RM2,000 (Ringgit Malaysia: Two Thousand only) was to alter the urine results or to procure the release of the eight youths; neither was it clear whether the monies were for the respondent or other

police personnel. Ultimately, as the eight youths were in any event released on police bail in accordance with regular police practice, before the remand of fourteen days had expired and without any monies having exchanged hands, further doubt is thrown on the authenticity of the evidence. Since the youths including Manivannan and Arivalagan were released independently of the solicitation or receipt of the sum of RM2,000 (Ringgit Malaysia: Two Thousand only), there is doubt as to whether the RM2,000 (Ringgit Malaysia: Two Thousand only) was in fact solicited for the purpose of procuring their release.

[39] This issue was considered in *PP v. Datuk Haji Harun bin Haji Idris (No. 2)* (as above):

> ... In *Crown Prosecutor v. R.K. Pillai*, it was held that since the payment of money was entirely independent of the application for an export permit that was made and it was given solely as a donation to the Sabha, and since contributions were being publicly invited for the building fund of the Sabha and were pouring in, the offence was not committed.

The sine qua non is the establishment of a connection between the performance of the official duty and the demand of the gratification before it can be said that the gratification demanded is an inducement for doing favour in relation to the official act.

In *Imperatrix v. Appaji* the amount was demanded directly for the restoration of the mahars in office; in *B.K. Sen v. Prasad*, the investment in government war loans asked for specifically for the performance of the arm clerk's duty of putting up the paper to the higher officer who had the power of granting the licence; and in *R v. Swemmer*, the bribe was given so that the official, whose duty it was to receive, classify and lay the tenders before the director of supplies, and to give any information of importance bearing on the tenders, could put up the tender before the said director whose duty it was to recommend it to the tender board which was the approving authority ...

[40] Therefore it is clear that in the instant case it is essential to consider whether a connection was established on the evidence, between the performance of the official duty and the demand of the gratification. This has to be established before it can be said that it is proved that the sum of RM2,000 (Ringgit Malaysia: Two Thousand only) was solicited in order to procure the release of the youths. And this was not established.

[41] How did the trial judge deal with this issue? She concluded after considering the evidence of Jambu, Sivanesan and Manivannan that the basis for which the RM2,000 (Ringgit Malaysia: Two Thousand only) each was sought as an inducement was not made out by reason of the contradictions in the evidence of these witnesses. She said:

> ... Keduanya alasan suapan di minta juga berbeza di antara keterangan SP5, SP7 dan SP8.
>
> Apakah alasannya untuk bebaskan SP5 dan SP8?
>
> Adakah bebas dengan jaminan polis atau untuk tukar keputusan air kencing atau untuk beri suapan kepada pegawai-pegawai OKT yang akan Bantu SP7 dan SP8? Terdapat percanggahan dari segi alasan pembebasan SP5 dan SP6 ...

[42] When this evidence is considered in the light of the requirement that it has to be shown that there was a connection between the performance of some official duty and the demand for gratification, it is clear that this last limb was not established on the evidence. The trial judge was therefore entitled to entertain doubts as to whether this element had been proved and conclude that the prosecution had failed to establish the ingredients of the charge. Accordingly this ground of appeal fails.

Issue (c): Whether It Was Sufficient For The Appellant To Establish 'Solicitation' Whereupon The Presumption In s. 42 Would Be Triggered Such That The Solicitation Would Be Deemed To Be Corrupt

[43] The appellant's contention was that once it had been established that the appellant had 'solicited' for the RM2,000 (Ringgit Malaysia: Two Thousand only), the statutory presumption in s. 42 of the Act was triggered, thereby allowing for a finding of 'corruptly' soliciting on the facts of the instant case. The learned trial judge, it was submitted had erred in failing to invoke the statutory presumption. What then is the law with regard to the invoking of s. 42(1) of the Act? The relevant parts of s. 42 which relate to soliciting under s. 10(a)(aa) of the Act read as follows:

> Where in any proceedings against any person for an offence under section 10, ... it is proved that any gratification has been ... solicited ... by ... the accused, the gratification shall be presumed to have been corruptly ... solicited ... as an inducement or a reward for or on account of the matters set out in the particulars of the offence unless the contrary is proved ...

[44] In *Public Prosecutor v. Romanus Clement Ungkin & Anor* [2005] 7 MLJ 447, Sulong Matjeraie J (as His Lordship then was) considered the position in law with regards to the stage at which the statutory presumption is triggered:

> ... a statutory presumption can only be invoked upon proving the matter that invokes the presumption. The learned sessions court judge is not satisfied that the prosecution has proved that PW1 had given the impugned RM740 to either one of the respondents, and then the statutory presumption cannot be invoked, (see *Attan bin Abdul Gani v. Public Prosecutor.*
>
> Heliliah Mohd. Yusof J. discussed in greater detail on how much presumption may be invoked in *Zabidi bin Morad v. Public Prosecutor* [2003] 3 MLJU 607. Quoting from a passage in the decision of Chang Min Tat J (as he then was) in *Public Prosecutor v. Ooi Seng Huat* [1968] 2 MLJ 168 who said: "Now as a matter of law a presumption is a statutory invention that upon the proof of a fact an inference of another fact can be drawn." ... This was further explained by Thomson CJ (as he then was) in *Ng Kim Huat v. Public Prosecutor* [1961] MLJ 308, 309 when he said: 'It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point, *the bare potential existence of such a presumption cannot itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising.* (emphasis added)

[45] In the instant case, the trial judge did not invoke the statutory presumption because she made findings of fact that the relevant ingredients in the charge under s. 10(a)(aa) of the Act had not been established. As discussed above, the evidence did not establish what the sum of RM2,000 (Ringgit Malaysia: Two Thousand only) each had been solicited for. Section 42 of the Act allows for the presumption of 'corrupt' solicitation once the elements of 'solicitation' as well as the elements of inducement to do or forbear from doing some official act and a connection between the performance of the official act and the gratification have been made. As such the issue of the application of the statutory presumption simply did not come into play. It would be erroneous to apply s. 42 simply upon proof of the asking or soliciting of gratification and then relying on the statutory presumption to establish the facts relating to the inducement. Accordingly the trial judge was correct in holding that the

prosecution failed to prove with any certainty why the sum of RM2,000 (Ringgit Malaysia: Two Thousand only) each was solicited and what the respondent did or was supposed to do or not do as consideration for the RM2,000 (Ringgit Malaysia: Two Thousand only). As there is insufficient evidentiary basis to invoke the statutory presumption, this ground of appeal also fails.

Issue (d): Whether The Learned Trial Judge Erred In Taking Into Consideration Manivannan's Evidence When Concluding That A *Prima Facie* Case Had Not Been Made Out At The Close Of The Prosecution Case

[46] The appellant's complaint under this ground of appeal was that the learned trial judge had incorrectly considered evidence in coming to a conclusion at the close of the prosecution case that a *prima facie* case had not been made out. From the appeal record it is clear that even independently of Manivannan's evidence, the appellant had failed to establish all the essential ingredients of its case against the respondent. While Manivannan's evidence is not directly relevant to the charge which is the subject-matter of this appeal, it does provide a factual matrix as to the background of the case, and how a complaint came to be initiated against the respondent. To such extent it is both admissible and relevant.

[47] Manivannan was the witness who lodged a report with the Anti-Corruption Agency on 24 February 1998 about three weeks after he had been released on police bail. His report is contained in exh. P10. The trial judge considered this report when concluding that the basis for the RM2,000 (Ringgit Malaysia: Two Thousand only) each solicited by the respondent varied in the testimonies of Manivannan, Jambu and Sivanesan. In P10, Manivannan states that he was arrested on 3 February 1998 and released on 17 February 1998, which is factually incorrect. He maintains that he was held in remand for 14 days which is also incorrect. And his further evidence was that the respondent solicited a sum of RM2,000 (Ringgit Malaysia: Two Thousand only) from him at the point when he was released so that no further action would be taken in court against him. Jambu was present when Manivannan made this report. It was on the basis of this report that an investigation was initiated against the respondent.

[48] The learned trial judge in considering Manivannan's evidence was giving consideration to the totality of the evidence before her in deciding whether or not a *prima facie* case had been made out. She was scrutinizing the evidence with care, as is required so as to ensure a maximum evaluation of the evidence. In view of the fact that even independently of Manivannan's evidence a *prima facie* case is not made out, and as such evidence provides background evidence which is relevant to the charge in issue, it cannot be said that the trial judge erred in considering Manivannan's evidence. It would be erroneous to take a clinical approach and surgically incise the totality of the evidence such that only certain portions are considered in isolation.

[49] A reading of the appeal record in respect of the first charge reveals that the evidence in this case is riddled with contradictions and lacunae. I was also reminded by learned counsel for the respondent that as this was an appeal, this court should be slow to interfere with the findings of the court below. He cited *Lim Kheak Teong v. Public Prosecutor* [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 where the Federal Court ruled as follows:

> ... With respect, what Lord Russell of Killowen said in *Sheo Swarup* that although no limitations should be placed on the power of the appellate court in exercising the power conferred the High Court should and will always give proper weight and consideration to such matters as:
>
> (1) the view of the trial Judge on the credibility of the witnesses;
>
> (2) the presumption of innocence in favour of the accused;
>
> (3) the right of the accused to the benefit of any doubt; and
>
> (4) the slowness of an appellate court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses ...

[50] In keeping with the above principles, it follows that there is no basis for interfering with the decision of the learned trial judge who entertained serious doubts as to whether a *prima facie* case had been established in the face of material contradictions on the evidence adduced. This appeal is therefore dismissed.